Supreme Court, U.S.
FILED
JUL 2 3 1994
OFFICE OF THE CLERK

No. 93-2066

In The

Supreme Court of the United States

October Term, 1994

MICHAEL BATTAGLIA,

Petitioner,

-against-

COUNTY OF SCHENECTADY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROEMER AND FEATHERSTONHAUGH, P.C.
Attorneys for Respondent
MICHAEL J. SMITH, ESQ.
(Counsel of Record)
CLAUDIA A. RYAN, ESQ.
THEODORE J. BAECHER, ESQ.
Office and P.O. Address:
Capital Center, 99 Pine Street
Albany, New York 12207-2781
Tel. No. (518) 436-7663

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 3

SECTION I

THE SECOND CIRCUIT'S DECISION IN *BAEZ V. HENNESSY* IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *PEMBAUR V. CITY OF CINCINNATI* 3

SECTION II

THE DECISION OF THE DISTRICT COURT AND CIRCUIT COURT IN THIS MATTER WITH REGARD TO THE ROLE OF A PROSECUTOR IN NEW YORK STATE IS NOT IN CONFLICT WITH THE INTERPRETATIONS OF NEW YORK STATE COURTS 6

SECTION III

PETITIONER'S COMPLAINT DOES NOT PLEAD A VIABLE CAUSE OF ACTION UNDER ANY THEORY 8

SECTION IV

THE DOCTRINE OF DERIVATIVE IMMUNITY IS APPLICABLE TO THIS CASE 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Arteaga v. State of New York, 72 N.Y.2d 212 (1988) 9

Baez v. Hennessy, 853 F.2d 73 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014.....3, 4, 5, 6

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).....8, 9

Brenner v. County of Rockland, 92 Misc.2d 833 (Supreme Court, Rockland County 1978), *aff'd*, 67 A.D.2d 901 7

Calderon v. County of Westchester, 111 A.D.2d 208 (Second Dept., 1985)..... 9

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 3

Covillion v. Town of New Windsor, 123 A.D.2d 763 (Second Dept., 1986)..... 9

Davis Construction Corp. v. County of Suffolk, 112 Misc.2d 652 (Supreme Court, Suffolk County 1987), *aff'd*, 95 A.D.2d 819 .....6, 7

Fisher v. State of New York, 10 N.Y.2d 60 (1961)..... 7

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 9

Imbler v. Pachtman, 424 U.S. 409 (1976)..... 9

Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989)..... 8

Johnson v. Town of Colonie, 102 A.D.2d 925 (Third Dept., 1984)..... 9

Monell v. Department of Social Services, 436 U.S. 658 (1978)..... 9

TABLE OF AUTHORITIES – Continued

Page

Owen v. City of Independence, 445 U.S. 622 (1980) ..9, 10

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)... 3, 4, 6

People v. Battaglia, 187 A.D.2d 808 (3rd Dept. 1992) 2

Schanbarger v. Kellogg, 35 A.D.2d 902 (Fourth Dept., 1970), *appeal dismissed*, 29 N.Y.2d 649, *cert. denied*, 405 U.S. 919 9

Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935) 4

United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797 (1984) 3

Whitmore v. State of New York, 55 A.D.2d 745 (3d Dept. 1971), *lv. denied*, 42 N.Y.2d 810..... 7

Yaselli v. Goff, 12 F.2d 396 (Second Cir., 1926), *aff'd*, 275 U.S. 502 (1926) 9

Ying Jing Gan v. City of New York, 996 F.2d 522 (2d Cir. 1993) 5

Zimmerman v. City of New York, 52 Misc.2d 797 (Supreme Court, New York County 1966) 7

STATUTE:

Ohio Rev. Code Ann. § 309.09(A) (1979) 5, 6

STATEMENT OF THE CASE

This action arises out of the criminal prosecution of Michael Battaglia. The involvement of the County of Schenectady was limited to the prosecution of Battaglia by the Schenectady County District Attorney's office and the confinement of Battaglia pursuant to a series of judicial orders of commitment.

On February 14, 1989, Battaglia was indicted for various crimes associated with a burglary, but this indictment was dismissed without prejudice. Thereafter, pursuant to New York Criminal Procedure Law 30.30, Battaglia was reindicted on all counts on February 22, 1989. The arraignment was scheduled for February 24, 1989, but the petitioner did not appear for the arraignment because he was serving a sentence in another jail on an unrelated charge. The People announced they were ready for trial and County Court rescheduled the arraignment for March 3, 1989.

Thereafter, petitioner's counsel moved to dismiss the indictment on the ground that Battaglia was deprived of his right to a speedy trial pursuant to New York Criminal Procedure Law 30.30. County Court denied the motion, determining that counsel's failure to object to the rescheduling of the arraignment constituted a consent to the adjournment and therefore the arraignment was timely.

Battaglia was convicted on all counts and thereafter appealed the County Court's denial of his motion to dismiss. By decision dated November 12, 1992, the Appellate Division of New York Supreme Court reversed

the decision of the County Court holding that the petitioner's failure to object to the adjournment of the arraignment did not constitute a consent. The Appellate Division, finding that petitioner was deprived of his **statutory** right to a speedy trial under New York Criminal Procedure Law 30.30, reversed his conviction. *People* v. *Battaglia*, 187 A.D.2d 808 (3rd Dept. 1992). Battaglia thereafter commenced this action alleging violations of his civil rights.

In his rambling statement of the case, petitioner misstates or omits facts bearing on whether this Court should grant *certiorari*. Petitioner contends at page 18 that the accusatory instrument which was the basis of his conviction was time barred. However, there is absolutely no evidence, nor can petitioner point to any, that the commitment orders issued by the various judges were in any manner illegal or erroneous. Battaglia also contends at page 20 that his prison term was "all for naught"; however, petitioner never moved for a stay of judgment pending his appeal pursuant to New York Criminal Procedure Law 460.50, which motion may have prevented him from serving his jail sentence pending the determination of his appeal. Petitioner also contends that his Sixth Amendment speedy trial rights were violated. However, as indicated by the Appellate Division decision reversing his conviction, Battaglia's **statutory** speedy trial rights were violated, not his constitutional speedy trial rights.

Petitioner also states at page 24 that respondent argued below that District Attorneys were not county officers and therefore the County is not liable for any acts committed by a District Attorney. This is simply inaccurate. Respondent contended below, and does so here, that

a District Attorney, **when he prosecutes a crime**, is acting under color of State Law and as a State Officer and therefore the County is not liable when he acts in this capacity. Petitioner also misstates relevant case law to support his petition, and these misstatements are addressed in the subsequent portions of this brief.

ARGUMENT

SECTION I

THE SECOND CIRCUIT'S DECISION IN *BAEZ V. HENNESSY* IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *PEMBAUR V. CITY OF CINCINNATI.*

Petitioner labors under the misconception that the Second Circuit's decision in *Baez v. Hennessy*, 853 F.2d 73 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014, is in conflict with this Court's holding in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). As relevant to this petition, *Pembaur* holds that a municipality may be found liable for the acts of its policymakers, but in order to be liable the official must be responsible for establishing final government policy. *Pembaur v. City of Cincinnati*, 475 U.S. at 481-483. Whether an official is responsible for establishing a municipality's policy and thus making that municipality liable for a §1983 claim is determined by a review of relevant State law. *Id.* at 483; *see also, City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). This Court noted in *Pembaur* that great deference is to be accorded the interpretation and application of State law by the Courts of Appeals. *Pembaur v. City of Cincinnati*, 475 U.S. at 484, n.13; *see also, United*

States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 815, n.12 (1984).

Deferring to the Court of Appeals' determination with respect to the interpretation of Ohio law, this Court in *Pembaur* found that **pursuant to Ohio law** the County prosecutor could establish County policy under appropriate circumstances and thus the County could be held liable for a §1983 violation. *Pembaur v. City of Cincinnati*, 475 U.S. at 484-485. The key question here is whether **under New York law** a District Attorney when prosecuting a crime acts as a County official sufficient to hold the County liable for an alleged §1983 violation.

This question has already been answered by the Second Circuit Court of Appeals. In an exhaustive analysis of New York Court decisions on this matter, the Second Circuit declared that "[w]hen prosecuting a criminal matter, a district attorney in New York State, acting in a quasi-judicial capacity, represents the State not the County." *Baez v. Hennessy, supra*, at 77. In reaching this conclusion, the Second Circuit relied on numerous New York court decisions as well as the constitutional and legislative history of the office of the District Attorney. Recognizing the unique role of the New York District Attorney in prosecuting criminal matters, the Second Circuit noted that New York State has retained numerous powers over the District Attorney, which no County can counteract. *See also, Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935) ("the district attorney in each county has been regarded as a state officer performing a state function").

In its analysis the Second Circuit was not unmindful of this Court's decision in *Pembaur.* In *Pembaur* the Second Circuit noted that this Court and the lower courts relied on an Ohio statute which specifically authorized a county prosecutor to instruct deputy sheriffs. *See, Ohio Rev. Code Ann.* §309.09(A) (1979). No similar statute exists in New York and in fact "controlling law [in New York] places limits on the County's authority over the district attorney". *Id.* at 77. Thus, unlike Ohio, a County in New York may not be held responsible for the actions of the District Attorney when he prosecutes a crime. *Id.* at 77.

Petitioner's perception of a conflict between *Pembaur* and *Baez* is likely based on his misreading of the holding in *Baez.* Petitioner views *Baez* as holding that a "District Attorney of any County [is] a State officer rather than a County officer." [page 44 of petition]. *Baez,* however, does not stand for this proposition; rather, *Baez* stands for the proposition that the District Attorney, **when he acts in a prosecutional role**, represents the State and not the County, and therefore the County cannot be held liable when he acts in this capacity.

Plaintiff's inability to grasp the concept that the District Attorney acts for different entities depending on what role he performs is further indicated by the Second Circuit's recent decision in *Ying Jing Gan v. City of New York,* 996 F.2d 522 (1993). In *Ying Jing Gan,* the Second Circuit reiterated that a District Attorney represents the State when prosecuting a crime (and therefore the County cannot be held liable for a §1983 claim), but may represent a municipality when discharging administrative functions. *Id.* at 536. Here, petitioner alleges that he was

wrongfully prosecuted, not that some administrative duty was improperly carried out.

Petitioner's comparison of New York and Ohio law with regard to budgeting and residency of District Attorneys is simply irrelevant to the issues in his petition. As indicated above, the Ohio statute in *Pembaur* gave the county prosecutor final decision-making authority by authorizing him to give legal advice to county officers, including Sheriffs, in matters connected with their official duties. *See, Ohio Rev Code Ann.* §309.09(A) (1979). Petitioner cannot point to any similar New York statute, because none exists, and the Second Circuit in *Baez* specifically held that the County cannot be held responsible for the actions of the District Attorney when he prosecutes a crime. In addition, the conduct of the county prosecutor under scrutiny in Ohio was not prosecutorial whereas here the conduct at issue is entirely prosecutorial. On this basis, this Court should not hear this petition as *Baez* and *Pembaur* are not in conflict.

SECTION II

THE DECISION OF THE DISTRICT COURT AND CIRCUIT COURT IN THIS MATTER WITH REGARD TO THE ROLE OF A PROSECUTOR IN NEW YORK STATE IS NOT IN CONFLICT WITH THE INTERPRETATIONS OF NEW YORK STATE COURTS.

New York Courts have expressly held that the District Attorney represents the State when prosecuting criminal matters and the County may not be held responsible when he acts in this capacity. *See, Davis Construction Corp. v. County of Suffolk,* 112 Misc.2d 652 (Supreme

Court, Suffolk County 1987), *aff'd*, 95 A.D.2d 819, *Brenner v. County of Rockland*, 92 Misc.2d 833 (Supreme Court, Rockland County 1978), *aff'd*, 67 A.D.2d 901; *Zimmerman v. City of New York*, 52 Misc.2d 797 (Supreme Court, New York County 1966). Although a District Attorney receives his budget from the County and is required to be a resident of the County he serves, the local government cannot control the manner in which the District Attorney performs his constitutional and statutory duties, which includes prosecuting crime. *See, Davis Construction Corp. v. County of Suffolk, supra*, at 663-665. Petitioner points to no New York statute, nor does one exist, in which the local government controls the District Attorney in performance of his prosecutorial duties. Both the District Court and the Second Circuit were absolutely in line with New York court decisions on this issue, and petitioner has once again misconstrued relevant case law to persuade this Court to hear his petition.

Petitioner relies heavily on the cases of *Fisher v. State of New York*, 10 N.Y.2d 60 (1961), and *Whitmore v. State of New York*, 55 A.D.2d 745 (Third Dept. 1971), *lv. denied*, 42 N.Y.2d 810. Although *Fisher* and *Whitmore* were civil suits based on certain alleged torts of the District Attorney, these cases only hold that the State cannot be held responsible for the actions of the District Attorney under a theory of *respondeat superior*. These cases do not state that the District Attorney acts for the County when prosecuting a crime, thereby making the County liable for any alleged §1983 violations. Furthermore, as indicated in Section IV, *infra*, Federal and State Courts have held that the County cannot be held liable for the prosecutorial acts

of its District Attorney's office because as a quasi-judicial officer he is immune from liability.

SECTION III

PETITIONER'S COMPLAINT DOES NOT PLEAD A VIABLE CAUSE OF ACTION UNDER ANY THEORY.

Petitioner contends that his complaint pleads a viable cause of action under either *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) or §1983 of the Civil Rights Act. It should be noted that petitioner has never made up his mind as to what theory he bases his claim on. Although petitioner apparently pled a §1983 cause of action in his complaint, at oral argument in District Court he indicated that this was not a §1983 action but rather a *Bivens* action. Now petitioner contends that he can bring this action under either §1983 or *Bivens*.

As both lower courts indicated, petitioner cannot plead a cause of action under *Bivens* because *Bivens* relates only to the actions of **federal** actors, and the County of Schenectady is clearly not a Federal actor. *See also, Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989).

Petitioner also fails to plead a §1983 cause of action because, as indicated in Sections 1 and 2 of this brief, the District Attorney in New York State is not acting as a County official when prosecuting a crime and therefore the County cannot be liable for his actions. Furthermore, petitioner has failed to plead any custom, practice or policy of the County of Schenectady, as is required in a §1983

claim. *See, Monell v. Department of Social Services,* 436 U.S. 658 (1978).

SECTION IV

THE DOCTRINE OF DERIVATIVE IMMUNITY IS APPLICABLE TO THIS CASE.

Petitioner contends that the County cannot derive immunity from the acts of its District Attorney. This statement is simply false. As New York and Federal Courts have held, a County cannot be held liable for the prosecutorial acts of its District Attorney's office, which are part of its official conduct in a criminal prosecution. *See, Imbler v. Pachtman,* 424 U.S. 409 (1976); *Yaselli v. Goff,* 12 F.2d 396 (Second Cir., 1926), *aff'd,* 275 U.S. 502 (1926); *Arteaga v. State of New York,* 72 N.Y.2d 212, 217 (1988); *Covillion v. Town of New Windsor,* 123 A.D.2d 763, 764 (Second Dept., 1986); *Calderon v. County of Westchester,* 111 A.D.2d 208 (Second Dept., 1985); *Johnson v. Town of Colonie,* 102 A.D.2d 925, 926 (Third Dept., 1984); *Schanbarger v. Kellogg,* 35 A.D.2d 902 (Fourth Dept., 1970), *appeal dismissed,* 29 N.Y.2d 649, *cert. denied* 405 U.S. 919.

Plaintiff refers to *Owen v. City of Independence,* 445 U.S. 622 (1980) and *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), to support his proposition. *Harlow,* which involved the question of whether aides to the President are entitled to good faith immunity, involved a *Bivens'* action, which is not the case here, and specifically did not address the issue of liability of a municipality for acts of a District Attorney. In *Owen,* a police chief was dismissed by the City, City Manager and members of the City

Council, who clearly are officials to implement a municipality's custom or policy. In *Owen*, the Court specifically said that the public should only be forced to bear the costs of injury inflicted by those whose acts may fairly be said to represent official policy. Here, as indicated above, the County may not be held liable for the District Attorney's actions when he prosecutes crime.

CONCLUSION

FOR THE REASONS STATED ABOVE, AND ON THE BASIS OF THE FURTHER DISCUSSION OF THE FACTS AND CASE LAW SET FORTH IN THE OPINIONS OF BOTH COURTS BELOW, THE PETITION SHOULD BE DENIED.

Dated: July 22, 1994

ROEMER AND FEATHERSTONHAUGH, P.C.
Attorneys for Respondent
MICHAEL J. SMITH, ESQ.
(Counsel of Record)
CLAUDIA A. RYAN, ESQ.
THEODORE J. BAECHER, ESQ.
Office and P.O. Address:
Capital Center, 99 Pine Street
Albany, New York 12207-2781
Tel. No. (518) 436-7663